

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4  
5 JOHN M. NICOL and CARILLON P. )  
NICOL, )

6 Plaintiffs, )

No. 03:13-cv-01903-HU

7 vs. )

8 WELLS FARGO BANK, N.A., and )  
9 CAL-WESTERN RECONVEYANCE )  
CORPORATION, )

10 Defendants. )  
11

**FINDINGS AND RECOMMENDATION  
ON MOTION FOR SUMMARY JUDGMENT**

12 Matthew C. Daily  
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14 Attorney for Plaintiffs

15  
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19 Attorneys for Defendants  
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22 HUBEL, United States Magistrate Judge:

23 This case was removed from Multnomah County Circuit Court on  
24 the basis of diversity jurisdiction. Dkt. #1. In their bare-bones  
25 Complaint, filed July 2, 2013, in state court, the Plaintiffs  
26 allege: (1) they own a residence purchased with funds borrowed from  
27 the defendant Wells Fargo Bank, N.A. ("Wells Fargo"); (2) Wells  
28 Fargo "subsequently assigned the deed of trust and the note to  
third parties," and appointed the defendant Cal-Western

1 Reconveyance Corporation ("Cal-Western") as successor trustee under  
2 the deed of trust; (3) Wells Fargo failed to record the assignment  
3 in Multnomah County; and (4) Cal-Western recorded a notice of  
4 default, and proceeded with non-judicial foreclosure of the  
5 Plaintiffs' residence. The Plaintiffs seek a declaratory judgment  
6 that Cal-Western lacked the authority to initiate non-judicial  
7 foreclosure proceedings, and therefore the non-judicial foreclosure  
8 is void. See Dkt. #1-1, ECF pp. 4-6.

9 On the same day they filed their Complaint, the Plaintiffs'  
10 attorney Matthew C. Daily filed a "Declaration in Support of Motion  
11 for Consolidation of Cases." See Dkt. #1-1, ECF pp. 7-9. (No  
12 separate motion to consolidate was filed.) In the declaration,  
13 Mr. Daily stated Wells Fargo had "filed a forcible entry and  
14 detainer action to evict [the Plaintiffs] from their residence on  
15 the basis of a trustee's deed issued after a non-judicial fore-  
16 closure sale." *Id.*, ECF p. 7. Mr. Daily stated the Plaintiffs'  
17 declaratory judgment action and Wells Fargo's FED action both  
18 involved the validity of the foreclosure sale. However, he argued  
19 discovery is not available in an FED action, so the Plaintiffs  
20 would be precluded from litigating their case fully in the FED  
21 action. Mr. Daily argued, therefore, that consolidation of the  
22 cases would allow both parties a full and fair opportunity to  
23 litigate their claims, and "[i]t would be most efficient, and  
24 afford the parties the most effective relief, to have both actions  
25 tried together." *Id.*, ECF p. 8.

26 Before the state court had ruled on the motion to consolidate,  
27 Wells Fargo removed the Plaintiffs' declaratory judgment action to  
28 this court. Dkt. #1. On January 16, 2014, Wells Fargo filed a

1 Motion for Summary Judgment. Dkt. #5. When the Plaintiffs failed  
 2 to file a response, the undersigned held a telephonic status  
 3 conference with Mr. Daily and counsel for Wells Fargo.<sup>1</sup> During the  
 4 status conference, which occurred on February 11, 2014, Mr. Daily  
 5 stated he had only agreed to represent the Plaintiffs through the  
 6 filing of their action in State court.<sup>2</sup> He indicated the  
 7 Plaintiffs were preparing a *pro se* response to Wells Fargo's motion  
 8 that would be filed through Mr. Daily's office. Wells Fargo agreed  
 9 to this unusual procedure, although it opposed any further  
 10 extension of time for the Plaintiffs to file their response. The  
 11 undersigned ordered that if the Plaintiffs failed to respond to  
 12 Wells Fargo's motion for summary judgment by February 24, 2014, the  
 13 court would take the motion under advisement with no response from  
 14 the Plaintiffs. See Dkt. #9. The Plaintiffs failed to file any  
 15 response to Wells Fargo's motion, and the court took the motion  
 16 under advisement on February 26, 2014. Dkt. #10.

17 Although the parties verbally gave their consent to have this  
 18 case decided by a Magistrate Judge, written consent forms have not  
 19 been filed in the case. Accordingly, the undersigned submits  
 20 findings and recommendations on disposition of the motion pursuant  
 21 to 28 U.S.C. § 636(b) (1) (B).

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25 <sup>1</sup>The Defendant Cal-Western has not been served in this case,  
 26 and apparently was never served in the state court case.

27 <sup>2</sup>In its Motion for Summary Judgment, Wells Fargo claims  
 28 Mr. Daily indicated "he needs to withdraw from the case but has not  
 had time due to a medical problem." Dkt. #5, ECT p. 1.

**DISCUSSION**

Wells Fargo argues the present case is barred by the doctrine of *res judicata*, because this action involves the same parties and claims as a prior lawsuit filed by the Plaintiffs, which was dismissed with prejudice by this court. See *Nicol v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1067 (D. Or. 2012) (Simon, J).

In *Nicol*, the Plaintiffs sought to enjoin the non-judicial foreclosure of their home. They also asserted claims for violation of federal and state consumer protection laws, and common-law claims. The Defendants filed a motion to dismiss and/or for summary judgment. As in the present case, the Plaintiffs failed to respond to the motion.

On March 8, 2012, Judge Simon ruled that all of the Plaintiffs' claims were barred. He held the Plaintiffs' state-law claims were preempted by federal law, and the Plaintiffs' claims under the federal Truth in Lending Act were untimely. He therefore dismissed the case with prejudice. *Id.*, 857 F. Supp. 2d at 1070-72.

On July 30, 2012, the Plaintiffs filed another *pro se* lawsuit, seeking to enjoin the foreclosure proceedings and the scheduled trustee's sale. In that case, the Plaintiffs named Wells Fargo and Cal-Western as defendants, as well as several other entities and numerous individuals. See *Nicol v. World Savings Bank FSB*, Case No. 03:12-cv-01364-MO). When the Plaintiffs were unable to locate counsel to represent them, they moved to dismiss the case without prejudice. *Id.*, Dkt. #21. Judge Mosman granted the Plaintiffs' motion, and dismissed the case without prejudice on December 14, 2012. *Id.*, Dkt. #22.

On July 9, 2013, the Plaintiffs filed the instant case in Multnomah County. The foreclosure sale of the subject property having occurred, the Plaintiffs now seek a declaratory judgment that the sale was improper. In Wells Fargo's motion for summary judgment, it argues the Plaintiffs' claims are barred by *res judicata*, relying on Judge Simon's decision in *Nicol*. Dkt. #6.

I recently had the opportunity to discuss the standards governing *res judicata*, in *Fairbank v. Underwood*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 6470987 (D. Or. Dec. 8, 2013) (Hubel, MJ), as follows:

When addressing the preclusive effect of a federal court judgment, which is what this Court is being asked to do, federal courts are required to apply federal *res judicata* rules. See *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1376 (9th Cir. 1987) (recognizing that the *res judicata* impact of a federal judgment is a question of federal law). Under federal law, "[r]es judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997) (emphasis added). For the doctrine to apply, "there must be: (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the parties." *Id.*

*Fairbank*, 2013 WL 6470987, at \*6.

Applying these standards to the present case, the second and third elements for preclusion clearly are met. The parties in *Nicol* and in the present case are identical, and a final judgment on the merits was entered. The first element requires "an identity of claims." Both cases involve the Plaintiffs' attempt to prevent non-judicial foreclosure and sale of their residence; however, the cases involve different claims.

1        *Nicol* was brought prior to completion of the non-judicial  
 2 foreclosure process. The sale of the Plaintiffs' residence had not  
 3 yet occurred. The Plaintiffs' arguments in *Nicol* concerned  
 4 allegedly deceptive practices related to a refinance loan the  
 5 Plaintiffs obtained from World Savings Bank FSB (which subsequently  
 6 changed its name to Wachovia Mortgage FSB, and then became a divi-  
 7 sion of Wells Fargo). See *Nicol*, 857 F. Supp. 2d at 1068. Judge  
 8 Simon described the Plaintiffs' claims in *Nicol* as follows:

9                Plaintiffs allege that World Savings  
 10 engaged in the deceptive practice of selling  
 11 them a loan based upon a low, fixed interest  
 12 rate when in fact the loan had a variable rate  
 13 feature with payment caps. . . . Plaintiffs  
 14 allege further that World Savings failed to  
 15 inform them that the loan "was designed to,  
 16 and did, cause negative amortization to  
 17 occur." . . . Rather, Plaintiffs allege,  
 18 during the loan application process, World  
 19 Savings "represented to Plaintiff[s] that in  
 accepting the loan terms set forth in the  
 Note," Plaintiffs "would be able to lower  
 their mortgage payments and save money." . . .  
 Plaintiffs allege that they reasonably  
 believed, "based on the representation con-  
 tained in the documents Defendant provided to  
 Plaintiff[s]," that Plaintiffs would be able  
 to refinance and get a new loan "before their  
 scheduled payments significantly increased."

20 *Id.*, 857 F. Supp. 2d at 1068-69 (citations to court documents  
 21 omitted). On these facts, the Plaintiffs brought claims for  
 22 violation of the federal Truth in Lending Act, violation of the  
 23 Oregon Unfair Trade Practices Act, breach of contract, and  
 24 fraudulent omissions. *Nicol*, 857 F. Supp. 2d at 1068.

25        The Plaintiffs' claims in *Nicol* were different from their  
 26 claims in the present case. The present case was filed after  
 27 completion of the non-judicial foreclosure proceedings, and after  
 28 sale of the Plaintiffs' residence. In this case, the Plaintiffs

1 allege Wells Fargo never recorded any assignment of the deed of  
 2 trust to Cal-Western, and therefore, Cal-Western lacked the legal  
 3 authority to proceed with non-judicial foreclosure of the Plain-  
 4 tiffs' residence. See Dkt. #1-1, ECF pp. 4-6.

5 Nevertheless, the pertinent question here is whether the  
 6 Plaintiffs *could have brought* their claims in the prior lawsuit.  
 7 See *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir.  
 8 1997) (citing, *inter alia*, *Federated Dept. Stores, Inc. v. Moitie*,  
 9 452 U.S. 394, 198, 101 S. Ct. 2424, 2427-28, 69 L. Ed. 2d 103  
 10 (1981)). Unquestionably, they could have. At the time of the  
 11 first lawsuit, the Plaintiffs were embroiled in the non-judicial  
 12 foreclosure process. The non-judicial foreclosure was being  
 13 pursued by Cal-Western. Whether that process had been completed or  
 14 not, the Plaintiffs could have made the same argument challenging  
 15 Cal-Western's legal authority to proceed with judicial foreclosure.  
 16 Thus, because the Plaintiffs could have brought their claim in the  
 17 prior action, the court finds claim preclusion applies to preclude  
 18 the Plaintiffs from bringing their claim in the present case. The  
 19 Plaintiffs have offered no argument to the contrary.

### 20 21 **CONCLUSION**

22 The undersigned finds the Plaintiffs' claims in the present  
 23 case are precluded. Therefore, Wells Fargo's motion for summary  
 24 judgment should be granted, and this case should be dismissed *with*  
 25 *prejudice*.

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**SCHEDULING ORDER**

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by **June 2, 2014**. If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed, then any response is due by **June 19, 2014**. By the earlier of the response due date or the date a response is filed, the Findings and Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 13th day of May, 2014.

/s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge